UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

LABOR PLUS, LLC AND ITS SUCCESSOR WYNN LAS VEGAS, LLC,	No.	28-CA-161779 28-CA-166890
And		
WYNN LAS VEGAS, LLC		
And		
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL UNION 720 (IATSE)		

MEMORANDUM IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL UNION 720 (IATSE)**

I. INTRODUCTION

The Union files this brief in support of its Exceptions to the Decision of the Administrative Law Judge ("ALJ") in the above referenced matter. There are two main areas of exceptions that this brief will address. First, whether David Weigant should be counted towards the successorship majority, and second, the failure of the Wynn to provide relevant information requested for bargaining

II. FACTS

This case was brought to establish the Wynn as the successor to Labor Plus. The Wynn is a casino and hotel operating in Las Vegas, Nevada. Prior to April of 2015, the Wynn had contracted with Labor Plus for Labor Plus to provide stagehands to staff its Showstoppers show in the Encore Theater. The Union, International Association of Theatrical Stagehand Employees, Local 720, filed a petition for recognition with the National Labor Relations Board which was eventually processed as case 28-RC-150168. The certification of representative in that case did not issue until December of 2015. By that time, the Wynn had already enacted a plan which brought that stagehand work in-house so instead of using employees of Labor Plus, the Wynn hired its own staff.

The ALJ in the pending matter found the Wynn would be a bargaining successor to Labor Plus if the former Labor Plus employees constituted a majority of employees at the Wynn. Based on the ALJ's analysis in the pending matter, this issue of the successorship obligation rests on whether or not one employee, David Weigant, should be included in the count to determine whether a majority of the Wynn's employees had been eligible voters as employees of Labor Plus.

III. THE STATUS OF DAVID WEIGANT

The ALJ took the position that, based on the stipulation between the parties (Joint Exhibit 20), the prior decision of a different ALJ in the related case of 28-RC-150168 holds no

weight in the determination of whether or not Mr. Weigant should be counted towards the successorship majority.

Mr. Weigant's vote was counted in the underlying election as the employer, Labor Plus, failed to provide evidence sufficient to show that he was not employed at the time (Joint Exhibits 11 and 14). Mr. Weigant was employed as a steady extra by Labor Plus assigned to the Wynn Theater. Per the testimony of Rita Taratko, no employee from Labor Plus was ever fired after their placement at a particular employer was completed and Labor Plus considers such employees on their rolls indefinitely.

The ALJ points to Joint Exhibits 11, 14, and 20 to support his decision. Joint Exhibit 20 is the Stipulation between the parties, and indicates that Mr. Weigant was hired by the Wynn on May 1 but does not indicate a date of separation from Labor Plus. Likewise, Joint Exhibit 11 is the Hearing Officer's Report on Challenged Ballots and Objections, which, on page 16, discusses the record evidence regarding Weigant and does not show a particular date for the end of employment with Labor Plus. The third is Joint Exhibit 14, the Decision and Order Overruling Objections and Directing Opening and Counting of Ballots which leads to Mr. Weigant's ballot being opened based on the unreliable testimony of the employer Labor Plus to attempt to prove his vote should not be counted.

None of these documents indicate that Mr. Weigant was no longer employed by Labor Plus on May 2. At most, Joint Exhibits 11 and 14 are non-determinative on Mr. Weigant's status. Joint Exhibit 20 simply shows an agreement that Mr. Weigant was hired by the Wynn on May 1. These documents do not require a finding that Mr. Weigant was no longer an employee of Labor Plus, nor that he was exclusively an employee of the Wynn. As a steady extra, Mr. Weigant did not receive full time employment from Labor Plus nor did he receive full time employment from the Wynn. There is nothing incompatible in finding that Mr. Weigant was employed by both simultaneously. As such, he should be included in the successorship majority.

That is to say, there is no inconsistency with Mr. Weigant being an employee of both employers for some period of time[1].

No evidence produced, in either the underlying matter or at the hearing at hand, contradicts a finding that Mr. Weigant was an employee of both employers. The fact that he did not work after April 28 at the theater for Labor Plus does not undercut his employment status or voting elegibility. On April 28 through May 9, the last day Labor Plus referred stagehands to the Encore theater, Mr. Weigant was still on Labor Plus's rolls and could have been referred to the Wynn. This is akin to including employees in a short term layoff as eligible voters. In fact, the stipulated agreement in 28-RC-150168 reads in pertinent part:

> **Those eligible to vote in the election are employees** in the above unit who were employed during the payroll period ending April 18, 2015, including employees who did not work during the period because they were ill, on vacation, or were **temporarily laid off**.

(emphasis added)

As addressed above, Ms. Taratko testified that Mr. Weigant was still an employee of Labor Plus, even if work was not currently offered. Even if he was an employee of the Wynn, he was also an employee of Labor Plus. Mr. Weigant should have been included in the successorship majority and as a result, 11 out of 20 employees or 55% of employees of the Wynn on June 16, 2015 were employed by Labor Plus during the election held on May 2, 2015. Because Mr. Weigant should have been counted towards a successorship majority, the resulting conclusion is that the Wynn hired a majority of former Labor Plus employees and a bargaining obligation attached to the Wynn.

IV. FAILURE TO PROVIDE INFORMATION

The stipulation between the parties indicates the only response from the Wynn to the Union in response to its demand to bargain was Joint Exhibit 13. This letter shows a clear decision on behalf of the employer to provide no further information to the Union and to deny its

[1] In fact, employment with both employers, absent any evidence of a termination from Labor Plus, harmonizes the prior decision and the stipulation.

obligation to bargain. Because the bargaining obligation attached to the Wynn, the unfair labor charge based on the failure to provide information follows.

V. CONCLUSION

The Order of the ALJ inherently contains assumptions of which no showing was made at hearing and a complete disregard for the realities of an employee engaged as a steady extra in the entertainment industry. In so doing, it ignores the reality of multiple employers for an employee at any point in time and disregards the prior findings of the ALJ in the related RC matter. The evidence relied on by the ALJ to show that Mr. Weigant was no longer employed by Labor Plus and thus not eligible to be counted toward the successorship majority does not support that contention. At most, it supports a finding that Mr. Weigant worked more than one job.

Based on the foregoing, the Union requests that the Board review this matter and find Mr. Weigant to be an employee who should be included in the successorship majority analysis. His inclusion results in 55% of the employees being employed by the prior employer thus ensuring that the Wynn has a bargaining obligation to the Union and establishing the Wynn's violations of the Act.

Dated: March 16, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/S/ CAREN P. SENCER
By: CAREN P. SENCER

Charging Party INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL UNION 720 (IATSE)

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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on March 16, 2017, I electronically filed the forgoing **EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** with the National Labor Relations Board and served the document in the manner described below:

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 16, 2017, at Alameda, California.

/s/ Lara Hull
Lara Hull